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good bill of exchange here, and no bill of exchange in Paris or Vienna, as was the case in *Amsinck v. Rogers*, 189 N. Y., 252, 82 Northeastern, 134. There ought to be no serious difficulty in the adoption of one form, good everywhere; though in disposing of the rights of indorsees, there are necessary difficulties, which have embarrassed previous Conferences of nations called to deal with the general subject. Both the present German Statute of Bills and the British Chalmers Act of 1882 have certain rules respecting a conflict of laws, but they can hardly be deemed, even within their restricted fields, to be adequate to the necessities of commerce.

CRIMINAL LAW—CHARGE TO THE JURY.

Although many of our courts are in motion in the right direction, away from the realm of technicalities, only too often we find others taking a backward step. The recent case of *State v. Seaboard Air Line Ry.*, (N. C.) 59 S. E. 1048, is another triumph of mere technicalities. In this case the defendant railroad was indicted under a statute prohibiting the running of freight trains on Sunday between certain hours. There was only one witness at the trial. He testified that he saw two freight trains pass a certain place on Sunday. The defendant introduced no witnesses whatever. The judge charged the jury that "if they believed the evidence" they should bring in a verdict of guilty. This was held to be error.

In nearly all jurisdictions it is error for a judge to direct a verdict of guilty in a criminal case, where the defendant pleads not guilty, even when the evidence is conclusive or uncontradicted. *State v. Wilson*, 62 Kans. 621; *Shaffner v. Com.*, 72 Pa. St. 60. But this has been allowed in a few cases. *People v. Elmer*, 109 Mich. 493. Nor is the judge at liberty in most jurisdictions to express an opinion either as to the weight of evidence or as to facts which might influence the action of the jury. *People v. Cowgill*, 93 Cal. 596; *Hayes v. State*, 58 Ga. 35. In the federal courts, however, the judge is allowed to express an opinion. *Lovejoy v. United States*, 128 U. S. 171. The charge in the North Carolina case under discussion did not infringe upon these general rules.

How then was any injustice done the defendant by the charge that the jury bring in a verdict of guilty if they believed the evidence? The evidence for the prosecution was uncontradicted, was not conflicting and if believed showed the defendant's guilt beyond a reasonable doubt. In cases like this the courts both in England and in this country have recognized that substantial justice is done by a charge containing the expression, "if the jury believe the evidence." *Taylor v. State*, 121 Ala. 24; *Derby v. State*, 60 N. J. L. 258; *State v. Woolward*, 119 N. C. 779. The position taken by these courts is well illustrated by Judge Ligon in *Thompson v. State*, 21 Ala. 48, where he said, "We have repeatedly held, that, where the testimony proceeds altogether from one party, and involves no conflict, the court may draw its

own legal conclusion, and give it in charge to the jury, . . . for, I take it, that no man can be said to believe testimony, when he has a reasonable doubt of its truth." In a similar case, *State v. Vines*, 93 N. C. 493, the court recognized the same charge in these words: "It was insisted on the argument here, that the judge invaded the province of the jury in instructing them that, 'if they believed the testimony of the witness, the prisoner was guilty of manslaughter.' We do not think so; this contention has not the slightest foundation."

This charge is not proper, however, where a substantial conflict exists in evidence upon any material question of fact, where the incriminating evidence is wholly circumstantial or indefinite and uncertain, or where material inferences are to be drawn therefrom by the jury. *Weil v. State*, 52 Ala. 19; *Perkins v. State*, 50 Ala. 154; *State v. Dixon*, 104 N. C. 704; *State v. Green*, 48 S. C. 136. The distinction between this class of cases and those where the charge was held to do justice is well pointed out by the court in *Duffy v. People*, (N. Y.) 5 Park. Cr. 324, as follows: "It was objected that the court erred in charging the jury, that if they believed the witnesses for the prosecution, it would be their duty to bring in a verdict of guilty. The case of *People v. Pfomer*, 4 Park. Cr. R. 558, is quoted to sustain this objection. But this, and other cases to which reference is made, involved circumstantial as well as positive evidence. It therefore, clearly rested with the jury in those cases to construe the circumstances; and the verdict did not depend exclusively upon the veracity of the witnesses, but also upon the effect which the jury would give to these circumstances. In the case under consideration, the proof was altogether positive; circumstantial proof was nowhere adduced, and the result depended exclusively upon the veracity of the witnesses. The charge was, therefore, correct."

It was claimed, however, in the case under discussion, that the evidence was indefinite and uncertain. The sole witness testified that at about 2:30 P. M. on a Sunday he saw two freight trains pass north through Franklinton, N. C. One train contained eighteen empty freight cars with doors open. The other contained fifteen empties, five cars of lumber and a car of pig iron; all doors open. He could not designate the exact Sunday, but there surely was nothing uncertain about this evidence as to its indication of the defendant's guilt, if the jury believed it. It was not conflicting, nor circumstantial, nor were any material inferences to be drawn from it.

Thus the trial judge seems to have complied, at least in substance, with the State statute which provided as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." This statute had been on the books since the year 1796, and had repeatedly been construed as broad enough to cover

a charge containing the phrase, "if the jury believe the evidence." *State v. Woolard*, 119 N. C. 779; *State v. Riley*, 113 N. C. 648; *State v. McLain*, 104 N. C. 897; *State v. Vines*, 93 N. C. 493. Why then did the court seek to amplify a technicality in order to find error, even though the charge was faulty or technically erroneous? Considering the standard of intelligence of our juries, such a charge would perhaps do justice many more times than a lengthy and complicated exposition of the law such as is often given.

Such decisions as the one under consideration add strength to the cry of those writers who picture the increasing delay and expense of litigation, which encourage defiant criminality and foster the spirit of litigious gambling. In spite of technical error it surely seems as if a new trial ought not to be had unless it appears probable that the jury were misled by the instructions. Rather than elevate technicalities to be an end in themselves, it would be far better to go back to the orthodox English method of giving the judges great latitude in the use of their discretion in granting a new trial. See *Miller v. State*, 3 Wyo. 657. In fact here is found the great criticism of our American criminal procedure; the tendency to amplify technicalities and wrest from our judges the conserving power which they ought to retain and which they had at common law, and to elevate the jury's power beyond anything which is wise and prudent. Judge Nisbet, in *Cook v. State*, 11 Ga. 53, forcefully put the warning in these words: "It is to be feared, in these days, that the judges will be so strictly laced, as to lose all power of vigorous and healthful action. I have but little fear of the judicial power so aggrandizing itself as to endanger any of the powers of other departments of the government; or to endanger the life and liberty of the citizen; or to deprive the jury of their appropriate functions. The danger rather to be dreaded is making the judges men of straw, and thus stripping the courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law."

PART PAYMENT OF A DEBT AS CONSIDERATION FOR A PROMISE.

A new assault has lately been made upon the established doctrine that a part payment of a debt already due is not a sufficient consideration for a promise by the creditor to forego his right to the residue. As is well known, the rule is based upon what is probably a misinterpretation of a dictum in *Pinnel's Case*, 5 Coke, 117, as followed in *Foakes v. Beer*, 9 App. Cas. 605. See 12 Harv. Law Rev. 521. The supreme court of New Hampshire now holds in *Frye v. Hubbell*, 68 Atl. 325, that such a part payment is a sufficient consideration. That there is a considerable tendency in America toward this result is evidenced by the fact that the former rule has been changed by statute in some ten States and by court decision on common-law grounds in two States besides New Hampshire. *Clayton v. Clark*, 74 Miss. 499; *Dreyfus v. Roberts*, 75 Ark. 354.